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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT; JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California,

Appellants,

vs.

UNITED AIR LINES, INC., a corporation; CATALINA AIR TRANSPORT, a corporation, and the CIVIL AERONAUTICS BOARD,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEES, UNITED AIR LINES, INC. AND CATALINA AIR TRANSPORT.

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OPINION BELOW.

The opinion of the three-judge District Court (R. 46-50) is reported at 109 F. Supp. 13.

JURISDICTION.

The judgment of the three-judge District Court was entered on January 28, 1953. (R. 65-67.) A motion for a

new trial, which was filed on February 6, 1953 (R. 68), was denied on February 20, 1953. (R. 104.) The petition for appeal was filed on March 27, 1953 (R. 105), and an order allowing the appeal was entered on the same day. (R. 106.) The appeal was filed in this Court on May 22, 1953, and this Court entered an order on June 15, 1953 postponing further consideration of its jurisdiction and of the motion to dismiss or affirm until the hearing on the merits. (R. 265.)

The jurisdiction of this Court rests on 28 U. S. C. 1253, and 2101 (b).

QUESTIONS PRESENTED.

The three-judge District Court granted injunctive and declaratory relief against attempts by the Appellants to assume regulatory control over air operations conducted by Appellee United Air Lines, Inc. between the mainland of California and Santa Catalina Island after finding that such operations are subject to exclusive regulation by the Appellee, Civil Aeronautics Board. Appellants' statement of the questions presented in this appeal is misleading because it contains no reference to Appellees' attack on the constitutionality of Section 2107 of the California Public Utilities Code which was the reason why the case was heard below by a three-judge District Court. Moreover, Appellants' statement of the questions presented is incomplete because in large degree it ignores the merits of the controversy. Appellees submit that a more accurate statement of the questions presented is as follows:

1. Whether the case was properly heard by a three-judge District Court under 28 U. S. C. 2281 to consider Appellees' contention that enforcement of Section 2107 of the California Public Utilities Code against them would violate the Federal Constitution, and consequently whether the judgment below is di-

rectly appealable to this Court under 28 U. S. C. 1253.

2. Whether the record supports the findings of fact of the three-judge District Court that the air carrier Appellees established a threat of irreparable injury justifying injunctive relief and whether the District Court properly awarded declaratory relief.

3. Whether transportation by aircraft between the mainland of California and Santa Catalina Island goes through air space over a place outside the State of California and hence is "interstate air transportation" within the meaning of the Civil Aeronautics Act.

4. Whether, by the provisions of the Civil Aeronautics Act and the Board's action thereunder, the United States has assumed exclusive jurisdiction to regulate Appellees' operations between the mainland of California and Santa Catalina Island.

STATUTES INVOLVED.

The provisions of the Civil Aeronautics Act, the California Public Utilities Code, and the California Constitution relevant to this case are set forth as Appendix A to Appellants' Brief, and are therefore not reprinted, but are cited, in this Brief. Certain additional statutory provisions are quoted in the text where appropriate.

STATEMENT.

Santa Catalina Island, part of the State of California, is located in the Pacific Ocean approximately 30 miles from the mainland of California. (R. 58.) In 1939, Wilmington-Catalina Airlines, Ltd., was awarded a Certificate of Public Convenience and Necessity by the Civil Aeronautics Authority (now known as the Civil Aeronautics Board) authorizing the air transportation of persons and property between Wilmington, on the mainland

of California, and Avalon on Santa Catalina Island. (R. 35, R. 58.)

The issuance of this Certificate to Wilmington-Catalina Airlines, Ltd. was based upon findings that the boundaries of California did not extend beyond three miles from the shoreline of the mainland, and beyond three miles from the shoreline of Santa Catalina Island. (R. 58.) Because aircraft flying between Wilmington and Avalon were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather Certificate*, 1 C. A. A. 431. (R. 58.)

Subsection 20 (a) of Sec. 401 of the Civil Aeronautics Act defines "interstate air commerce" subject to federal regulation as including, in part, "the carriage by aircraft of persons or property for compensation or hire * * * between places in the same State of the United States through the air space *over any place outside thereof.*" (49 U. S. C. 401, Sec. 20(a)). (Emphasis added.)

Subsection 21(a) of Sec. 401 of the Civil Aeronautics Act defines "interstate air transportation" subject to federal regulation as including, in part, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * between places in the same State of the United States through the air space *over any place outside thereof.*" (49 U. S. C. 401, Sec. 21(a)). (Emphasis added.)

In 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airlines, Ltd. to Los Angeles, authorizing the carrier to conduct operations between Los Angeles and Avalon via the intermediate point of Wilming-

ton-Long Beach, California. (R. 58.) At the same time, the Board reissued the Certificate in the name of the Appellee, Catalina Air Transport. *Catalina Air, Service to Santa Catalina Island*, 2 C. A. B. 798. This amended certificate is still in full force and effect. (R. 58.)

In 1942, after the carrier's equipment was requisitioned by the United States for military purposes, the Board authorized a temporary suspension of operations which continued for the duration of World War II. See 6 C. A. B. 1041, 1043 (1946). (R. 59.) After the war, the Civil Aeronautics Board approved an operating contract between Appellees, United Air Lines and Catalina Air Transport, dated March 7, 1946, whereby United agreed to perform and discharge all of the obligations of Catalina Air Transport under its Certificate of Public Convenience and Necessity. *United Air Lines, Catalina Air Transport*, 6 C. A. B. 1041. (R. 59.) Various supplemental agreements relating to the rates and fares for the transportation provided by United were subsequently approved by the Civil Aeronautics Board, together with other agreements relating to miscellaneous details of the Catalina operation. (R. 59.) Operations have been continuously conducted by United over such route from June 3, 1946 to date. (R. 59.) Tariffs for the carriage of persons and property have been, and are maintained on file by United with the Civil Aeronautics Board. (R. 59-60.)

Since 1939, therefore, air transportation between California and Santa Catalina Island has been conducted by Appellee carriers under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. Until 1951, the jurisdiction of the Civil Aeronautics Board remained unchallenged. Tariffs for the operations were never filed with the California Commission, which evinced no interest whatever in the route until 1951—more than 12

years after the federal agency had assumed full regulatory control.

Without explanation, the Commission suddenly developed an interest in the route in 1951. On August 6, 1951, the Director of Transportation of the California Public Utilities Commission sent a letter concerning the Catalina operations to Appellee United, stating that a review of the Commission's files "fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic." This letter stated: "It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter." (R. 37-38.)

United replied to the Commission on September 10, 1951, stating that its tariffs for this route were on file with the Civil Aeronautics Board, saying: "Inasmuch as the Public Utilities Commission of the State of California does not have jurisdiction over the regulation of this service, we have not filed a tariff with your Commission." (R. 38-39.)

On September 20, 1951, the Secretary of the Commission sent another letter to United. This letter stated:

> *"This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question."* (Emphasis added.) (R. 39-40.)

On October 11, 1951, United wrote to the Commission stating that United's Law Department was reviewing the question. (R. 40.) On November 6, 1951, the Commission sent another letter to United requesting that United inform the Commission of its position. (R. 41.) On November 30, 1951, United sent another letter to the Commission

stating that the Commission would hear from United's counsel within a few days, and on December 5, 1951 United's counsel sent a letter to Mr. Wilson E. Cline, the Assistant Counsel of the Commission. In this letter of December 5, counsel for United, after stating that the letter was addressed to Mr. Cline because it concerned a question of law, went on to point out that the Catalina route was not subject to the jurisdiction of the State Commission because

> "all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstances, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U. S. C. 401 (10), (20, and 21)). Ipso facto, this precludes the exercise of control by the State." (R. 43.)

On December 27, 1951, the California Commission responded through its Secretary, R. J. Pajalich, who wrote that the letter of December 5 from United's counsel to Mr. Cline "has been referred to this office for reply." The Commission's reply, set out in full at pages 44 to 46 of the Record, concluded as follows:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution *we again instruct your client United Air Lines, Inc. to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.*" (Emphasis added.) (R. 46.)

Because of other litigation which was then (and still is) pending[1] between the California Public Utilities Commission and United concerning United's liability for penalties for an alleged tariff violation, United had reason to be

1. *People of the State of California* v. *United Air Lines., Inc.*, California District Court of Appeal, First Appellate District, 1 Civil No. 15,549, opinion filed June 10, 1953, 258 P. 2d 66; order granting hearing by Supreme Court of California filed August 6, 1953, Case No. S. F. 18900.

aware of Sec. 2107 of the California Public Utilities Code, which provides:

> "Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any *order, decision, decree, rule, direction, demand, or requirement of the Commission*, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than Five Hundred Dollars ($500) nor more than Two Thousand Dollars ($2,000) for each offense." (Emphasis added.) (Appellants' Brief, Appendix A, p. xii.)

The Public Utilities Commission had in the past asserted that the penalties prescribed by Sec. 2107 were applicable to air carriers and had, as stated above, actually instituted proceedings in the California courts to recover such penalties against various air carriers, including Appellee United, in other disputes concerning the regulatory jurisdiction of the Commission. (Finding of Fact 12, R. 60-61.)

Faced with conflicting claims of jurisdiction over United's Catalina route by State and Federal agencies and confronted with the prospect of reparation suits and incurring penalties up to $2,000 for each day that its tariffs were not on file with the California Commission, plus the risk of jeopardizing its 1946 contract with Catalina Air Transport which had been approved by the Civil Aeronautics Board, United brought this action in the United States District Court for the Northern District of California, with Catalina Air Transport joining as a party plaintiff.

Appellees' complaint alleged, *inter alia*, that the California Commission was asserting: that the Catalina operations were "entirely under the control and regulation" of the Commission; that United, in failing to file its tariffs pursuant to the Commission's directions, had violated Sec. 2107 of the California Public Utilities Code; that United

had thereby become liable for penalties up to the sum of $2,000 per day for each day of violation. (R. 4-5.)

In addition, the complaint alleged that Appellees had no "plain, speedy and efficient remedy in the courts of the State of California," that there were substantial risks of other penalties, including criminal penalties, and that the Commission claimed that the State statute authorized the bringing of "numerous suits for so-called reparations in which said defendants claim that all rates or charges collected by plaintiff United Air Lines, Inc., may be recovered together with interest and, if the violation was wilful, with exemplary damages in undefined amounts * * *." (R. 5-6.)

The complaint further alleged that the defendants' claims were unfounded because Congress, by passing the Civil Aeronautics Act, had pre-empted the entire field of regulation of the route, that the carriers were therefore not subject to the provisions of the Public Utilities Act of California imposing penalties, and that if those penalties were in any way applicable they were "excessive, unreasonable, arbitrary and oppressive, and impose an unreasonable burden on commerce, and amount to a taking of the property without due process of law, and constitute deprivation of the equal protection of law—all in violation of the Fourteenth Amendment to the Constitution of the United States." (R. 5.)

Appellees requested a declaration of rights and an injunction restraining the California authorities "from instituting any action or taking any proceeding for the enforcement or collection of any of the penalties claimed by the defendants." (R. 8.)

Because of the constitutional claim presented by the complaint, a three-judge District Court was convened, pursuant to 28 U. S. C. 2281, and 2284. On August 1, 1952, the

Civil Aeronautics Board moved for leave to intervene as a party plaintiff (R. 13-14), and the Court permitted such intervention on August 12. (R. 21.) The Board's complaint in intervention alleged that the Civil Aeronautics Act had vested the Board with exclusive jurisdiction over the Catalina operations, and that attempts by the California Commission to assume regulatory control over the Catalina operations "constitute an unlawful interference with interstate commerce and unlawfully interfere with the jurisdiction and functions of the Civil Aeronautics Board." (R. 25.)

Before the trial the parties entered into an agreed statement of facts. (R. 34-37.) In this agreed statement of facts, the correspondence between the Commission and Appellee United was incorporated as Exhibits A-1 through 10. (R. 37-46.) (Appellants' Brief, Appendix B.)

The extent to which an action for penalties was threatened by the Commission prior to the time of trial was in dispute, Counsel for Appellees testifying that the threat of such an action had been made, Chief Counsel for the Commission testifying that he had no recollection of making the statement attributed to him. (R. 169-170, 201.)

During the trial of the case, however, Counsel for the Commission stated without qualification that penalties would be sought if after proceedings before the Commission to determine its jurisdiction United failed to comply with such order as might be issued. (R. 179, 197.) Chief Counsel for the Commission further testified that the Commission's prior written assertions of jurisdiction and directives to United had been entered upon his advice and recommendation (R. 199), and that he would again advise the Commission that it had jurisdiction if the Commission conducted a formal proceeding into the question of the Catalina operations. (R. 200.)

After hearing this testimony, other evidence, and the arguments of counsel, the District Court unanimously found that:

> "13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (Finding of Fact 13; R. 61.)

The Court also concluded that:

> "4. The proceeding before the defendant Public Utilities Commission which the defendants, unless precluded by action of this Court, intend to institute against the plaintiff air carriers will subject said air carriers, and possibly the public, to irreparable injury if the said Commission has no jurisdiction in the premises, and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board. These factors, coupled with the risks and expenditures to which the plaintiffs may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties, are such as to entitle both the plaintiffs and the intervenor to declaratory relief, and injunctive relief against actions which the defendants might otherwise institute concerning a sub-

> ject matter over which the defendant Commission and the State of California are hereinafter found to lack jurisdiction. Plaintiffs have no plain, speedy and efficient remedy in the Courts of the State of California, or otherwise, than by this action. Further, since the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law, this Court should decide the issues tendered irrespective of the existence or adequacy of any state Court remedies." (Conclusion of Law 4; R. 63.)

Unanimous in its opinion, the District Court pointed out that a three-judge Court was properly convened "because the complaint sought to restrain enforcement of a state statute, inter alia, upon the alleged ground of its unconstitutionality." (R. 48.) The Court concluded that:

> "A substantial question would have been presented as to the constitutionality of these penalty provisions, if reached, and the appointment of a three-judge Court pursuant to 28 U. S. C. 2281 and 2284 was appropriate and required for the purpose of enabling the Court to resolve all issues presented by the air carrier plaintiffs." (R. 62.)

The Court pointed out that after it had assembled and heard the case, it was found unnecessary to reach or decide "the issue tendered, that the State statute is unconstitutional." (R. 48.) However, finding other adequate bases of federal jurisdiction and other federal issues presented, the Court decided that since it had properly acquired jurisdiction, it had power to consider and dispose of all questions involved in this suit. (R. 48-49.) Accordingly, the Court entered its unanimous decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the Catalina operation and enjoining the State authorities from interfering in any manner with the Board's jurisdiction or from in any way controlling or regulating the Catalina route. (R. 65-67.)

Appellants filed a motion for a new trial on February 6, 1953. (R. 68.) The motion was heard February 19, 1953 (R. 237-262), and was denied on February 20, 1953. (R. 104.) The case was brought to this Court by direct appeal.

SUMMARY OF ARGUMENT.

Appellants presented substantial constitutional questions concerning the validity of a State statute under the Fourteenth Amendment and the Commerce Clause of the Federal Constitution to a three-judge District Court. The court determined that the constitutional questions were substantial, but found it unnecessary to reach these questions because of the existence of other federal grounds of decision. Because the jurisdiction of a three-judge court existing by reason of the presence of a substantial constitutional question extends to every question of law involved, the court below properly retained jurisdiction and decided the case on its merits.

The District Court properly awarded injunctive and declaratory relief. The District Court's findings of threatened irreparable injury supporting injunctive relief are clearly supported by the record. Declaratory relief, which does not even depend upon proof of threatened irreparable injury, was certainly proper in this situation involving a live, concrete controversy concerning competing jurisdictional claims between State and Federal agencies over an important segment of interstate air transportation. The District Court's finding that it was unnecessary for Appellees to submit to an expensive State proceeding is also clearly supported by the record. Realistically viewed, the State Commission had already reached a decision on the question of its jurisdiction before the Appellees brought this suit and the available State remedies were inadequate to review the Commission's decision.

The doctrine of exhaustion of administrative remedies should not be applied in the instant case where a state agency claims jurisdiction over an activity that has been subject to exclusive federal control for a period of 12 years and where the State's challenge to the federal agency's jurisdiction raises only questions of law.

By promptly eliminating incipient discord concerning the boundaries of authority between State and Nation, the District Court's decision maintained the delicate balance required by our federal system. The District Court acted well within its discretion in granting injunctive and declaratory relief and in deciding the case on its merits, especially because the case demanded resolution of important federal questions under the Federal Constitution and under a federal statute vesting exclusive regulatory concern in a federal agency.

The greatest portion of the flight between Catalina Island and the mainland of California is through the air space over a place outside the State of California. Therefore, this transportation falls directly within the definition of "interstate air transportation" in the Civil Aeronautics Act. The nature of air traffic, the legislative history and broad scope of the Civil Aeronautics Act illustrate beyond doubt that there is no room here for state regulatory action.

Although it comes within the statutory definition of "interstate air transportation," air traffic between Catalina Island and the California mainland is "foreign commerce" in the constitutional sense. This, and the unequivocal language of the statute, demonstrate the complete irrelevance of cases relied on by Appellants which invoke presumptions against the extension of general or doubtful Federal regulations to intrastate commerce.

ARGUMENT.

I. THE CASE BELOW WAS PROPERLY HEARD AND DECIDED BY A THREE-JUDGE DISTRICT COURT, AND THIS COURT THEREFORE HAS JURISDICTION BY DIRECT APPEAL.

The purpose of the various three-judge court statutes that Congress has enacted from time to time was to eliminate the feared propensity of federal judges to enjoin state statutes and administrative orders, and to safeguard against precipitate action by a single judge in setting aside the solemn legislative acts of the States. Congress sought to insure that State legislation would not be enjoined by the federal courts without mature deliberation by more than one District Judge, Moore, *Commentary on the U. S. Judicial Code*, 52 (1949); Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 803 (1934).

The applicable statute provides as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U. S. C. 2281.

In this case, Appellees' contentions meet every requirement of Sec. 2281. The State statute challenged was one of general application. *Ex parte Collins*, 277 U. S. 565 (1928), Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925* (1928), 42 Harv. L. Rev. 1, 27. *Rorick* v. *Commissioners*, 307 U. S. 208 (1939).

The claim of unconstitutionality was vigorously pressed. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392 (1934). The relief sought was directed against State officials charged with the responsibility under Sec. 2104 of the California Public Utilities Code[2] of enforcing the statute. *Ex Parte Public Bank of New York*, 278 U. S. 101 (1928).

In attacking the constitutionality of the California penalty statute (Sec. 2107, California Public Utilities Code, *supra*, p. 8), Appellants pointed out that the penalties prescribed by the statute range up to $2,000.00 for each offense and called the Court's attention to Sec. 2108 which provides that:

> "Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand or requirement of the commission, by any corporation or any person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Therefore, penalties up to $730,000 could accrue in a single year. Appellees contended that Appellants could bring suit to recover penalties at any time within the applicable limitations period and further pointed out that Sec. 2104

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2. "2104. Actions to recover penalties under this part shall be brought in the name of the people of the State of California, in the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of has its principal place of business, or in which the person complained of resides. Such action shall be commenced and prosecuted to final judgment by the attorney of the commission. In any such action, all penalties incurred up to the time of commencing the action may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the State in any such action, together with the costs thereof, shall be paid into the State Treasury to the credit of the General Fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court approves and orders."

specifically provides that "In any such action, all penalties incurred up to the time of commencing the action may be sued for and recovered." In addition, Sec. 2105 states that "All penalties accruing under this part shall be cumulative * * *." Therefore, Appellees contended that Appellants had the opportunity to assert liability for cumulative penalties wholly disproportionate to the seriousness of the claimed violation, that the threatened penalties were consequently excessive, oppressive, and violative of the Fourteenth Amendment and, further, that the threatened penalties constituted an unreasonable burden on interstate and foreign commerce. (R. 5, 6.) *Ex parte Young*, 209 U. S. 123 (1908). *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165 (1910), *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). Accordingly, the court below found that a substantial question as to the constitutionality of the penalty provisions of the California statutes was presented. (R. 62.)

Only after the three-judge court had convened, and only after hearing the evidence and considering the contentions of the parties, did the court find it unnecessary to decide the question of the constitutionality of the state statute. Applying the familiar rule that federal courts should refrain from invalidating statutes on constitutional grounds when there are other adequate grounds for decision, the court below found other federal questions before it which were determinative of the issues. (R. 48-49.)

This Court has decided on several occasions that the jurisdiction of a three-judge court existing by reason of the presence of a substantial constitutional question "extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling* v. *Constantin*,

287 U. S. 378, 393-394 (1932); *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255-256 (1938). "A District Court composed of three judges under Section 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for injunction, in order that a single law suit may afford final and authoritative decision of the controversy between the parties." *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621, 625 (1941). See also *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391 (1938).

Not satisfied with the commendable approach of the District Court of refraining from making decisions on constitutional issues when others will suffice, Appellants suggest that the court should have dissolved itself. But what purpose would have been served by dissolution? The court had already heard the evidence and the arguments and was familiar with all aspects of the case. The court was in a position to render in a single law suit a final and authoritative decision of the controversy. *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, *supra*. Dissolution of the court would have meant prolonged litigation with its attendant burdens and expenses upon the parties and the time of the courts. In dissolving itself the court would have left a cloud over the jurisdiction long exercised by the Civil Aeronautics Board over an important segment of air transportation. The decision and approach of the court below was consistent with sound and orderly judicial administration by promptly and expeditiously deciding the case.

Prior decisions of this Court make it abundantly clear that a three-judge court's jurisdiction and the jurisdiction of this Court by direct appeal do not expire when a decision on constitutional claims is unnecessary to disposition

of a case. *Winchester* v. *Winchester Water Works,* 251 U. S. 192 (1920); *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317 (1926); *Query* v. *United States,* 316 U. S. 486 (1942).

The cases cited by Appellants in their brief (p. 39) miss the point. In *California Water Service Co.* v. *Redding,* 304 U. S. 252 (1938), this Court held that the three-judge court should have been dissolved because the plaintiffs did not present a *substantial* federal question. *City of Springfield* v. *United States* was a case in which this Court denied certiorari (306 U. S. 650, 1939) after the Court of Appeals for the First Circuit decided that a three-judge court was not required because: (1) the suit was not brought to restrain a statute, but merely an assessment; (2) the suit was not brought against a State officer, but against an officer of a city; (3) the suit was not grounded upon the constitutionality of a State statute. 99 F. 2d 860, 862 (1938). *Case* v. *Bowles,* 327 U. S. 92 (1946) and *Ex parte Bransford,* 310 U. S. 354 (1940) hold merely that suits brought to enjoin the enforcement of State statutes on the ground that such enforcement would violate a federal statute do not require the convening of a three-judge court because such suits do *not* challenge the constitutionality of the State statute and involve only questions of statutory construction. 327 U. S. at 97, 310 U. S. at 359. The two District Court cases relied upon by Appellants (*Farmers Gin Co.* v. *Hayes,* 54 F. Supp. 43, D. C. W. D. Oklahoma 1943, and *Penn. Greyhound Lines* v. *Board of P. U. Comm'rs.,* 107 F. Supp. 521, D. C. New Jersey, 1952) follow the holdings in *Case* v. *Bowles* and *Ex parte Bransford.*

These decisions would be relevant if Appellees' attack upon the California penalty statute rested only on the ground that it conflicted with the Civil Aeronautics Act. But what Appellants conveniently omit in their argument

is the fact that Appellees presented a substantial constitutional question to the District Court by their entirely independent contention that the threatened enforcement of the penalty statute would violate the Fourteenth Amendment and would also interfere with Congressional power under the Federal Constitution to regulate commerce. Therefore, Appellants' cited authorities simply have no pertinence to this case.

Moreover, Appellees call attention of this Court to *Public Utilities Commission of Ohio* v. *United Fuel Gas Co., et al.*, 317 U. S. 456 (1943), which involved an attempt by the Ohio Public Utilities Commission to assert jurisdiction over an interstate gas company. A municipal ordinance of Portsmouth, Ohio established rates for natural gas sold in that city by a local utility. The local utility purchased its entire supply of gas from United Fuel Gas Company, a West Virginia corporation. When the local utility challenged the rates fixed by the city before the Ohio Public Utilities Commission, the Commission agreed that the local utility's rates had been unfairly set under the municipal ordinances. However, the Commission found that it could not set fair rates for the local utility in the absence of proof that the charges which United Fuel exacted from the local utility were just and reasonable. Accordingly, the Commission ruled that the sale of gas by United Fuel to the local utility and the rates to be charged for such service were subject to its jurisdiction.

United Fuel, claiming that its sale to the local utility was in interstate commerce, contended that the Ohio Commission had no jurisdiction over the rates charged. United Fuel offered to provide the Commission with evidence relevant to a determination of just and reasonable rates to be charged by the local utility for gas sold at retail to the people of Portsmouth. The Commission rejected this

offer and reaffirmed its previous assertion of jurisdiction over the rates to be charged for the sale of gas by United Fuel to the local utility. United Fuel then went to a three-judge federal court to restrain enforcement of the Commission's order, contending that the Commission's order was an unconstitutional attempt to regulate interstate commerce. It was stipulated by the parties that it would cost United Fuel in excess of $3,000 to comply with the Commission's order. United Fuel also claimed that if it disobeyed the Commission's orders it and its agents would be subject to substantial fines and penalties.

While the suit was pending in the three-judge court, Congress passed the Natural Gas Act of 1938. (52 Stat. 821, 15 U. S. C. Sec. 717.) The three-judge court later held that regardless of what the situation might have been in the absence of the Natural Gas Act, that statute deprived the Ohio Commission of power to regulate the rates to be charged for gas transported and sold in interstate commerce. 46 F. Supp. 309 (1941). Accordingly, the three-judge court enjoined the enforcement of the Commission's orders against United Fuel. The three-judge court found it unnecessary to discuss or consider the constitutional claim.

On direct appeal, this Court affirmed the decision of the three-judge court. 317 U. S. 456 (1943). Also finding it unnecessary to reach or decide the constitutional question, this Court placed its decision entirely upon the ground that the Natural Gas Act had vested the power to fix rates for natural gas transported and sold in interstate commerce exclusively in the Federal Power Commission.

The similarity between *United Fuel* and the instant case is striking. There, as here, a three-judge court was properly convened to consider a claim that a State statute violated the Federal Constitution. There, as here, the

three-judge court found it unnecessary to reach or decide the constitutional question, and placed its decision on the ground that a federal statute had pre-empted the field. There, this Court affirmed the action of the three-judge court, also finding it unnecessary to decide the constitutional question.

This case falls squarely within the holding and doctrine of *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*[3]

II. THE DISTRICT COURT PROPERLY AWARDED INJUNCTIVE AND DECLARATORY RELIEF.

Appellants contend that the District Court, whether sitting as a statutory three-judge court or as an ordinary District Court, improperly granted injunctive and declaratory relief. Appellants maintain:

1. That Appellees failed to make a showing of threatened irreparable injury sufficient to justify injunctive relief,[4] and that the District Court abused its discretion in awarding declaratory relief;

2. That Appellees had not exhausted their administrative and State court remedies; and

3. That, in any event, the District Court should

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3. If this Court should decide that the three-judge court was improperly convened, or that even though properly convened, the three-judge court should have dissolved itself after deciding that it was unnecessary to decide the constitutional question, the judgment below is nevertheless 'the final order of the district court. * * *' *Stainback* v. *Mo Hock Ke Loh Po*, 336 U. S. 368, 381 (1949). The only effect of such a decision would be to eliminate the jurisdictional basis under 28 U. S. C. 1253 for a direct appeal to this Court. *Gully* v. *Interstate Nat. Gas Co.*, 292 U. S. 16, 19 (1934); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392 (1934).

4. The contention that Appellees failed to show threatened irreparable injury also bears upon the issue of whether the three-judge court properly assumed jurisdiction over the controversy.

have stayed its hand in the interest of maintaining a proper federal-state relationship.

A. The Record Supports the Finding of Threatened Irreparable Injury by the District Court and Justifies the Award of Injunctive Relief; the District Court Properly Granted Declaratory Relief.

1. Appellants' contentions concerning proof of threatened irreparable injury really seek to overrule the finding of fact of the District Court on this issue. Therefore, the problem is determining whether the District Court's findings are supported by the record.

The District Court found:

> "12. Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission. The defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant [fol. 87] United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the defendant Public Utilities Commission.
>
> "13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant

> Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (Findings 12-13; R. 60-61.)

It must be emphasized that the court below had the opportunity at first hand to hear the testimony of the witnesses and weigh the evidence. The court below was familiar with the context in which this suit arose. The evidence established that the Commission had in the past demanded that United pay penalties as a result of proceedings brought by the Commission in the courts of California arising from earlier disputes concerning the regulatory jurisdiction of the Commission. Litigation concerning these penalties demanded by the Commission is still pending in the California courts. Consequently, there was nothing fanciful or imaginary about the risks which United feared in this case—especially in the light of the prior and presently pending litigation with the very same Commission. In addition, United was aware of Section 2113 of the California Public Utilities Code, which provides:

> "2113. Every public utility, corporation, or person which fails to comply with any part of *any order, decision, rule, regulation, direction, demand,* or *requirement of the commission* or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto." (Emphasis added.)

The peril of contempt proceedings, therefore, was genuine and substantial.

Moreover, United recognized that if it submitted to the State Commission's jurisdiction, it might well subject itself to penalties under the Civil Aeronautics Act because it was already obligated by law not to charge rates for the route different from those already established in its tariffs on file with the Civil Aeronautics Board. 49 U. S. C. 622 (d) and 49 U. S. C. 483.[5]

Judge Goodman said during the hearing for a motion for new trial:

> "[United] doesn't want to get caught in between the two juggernauts approaching him, one from each side, and he doesn't want to get caught in between." (R. 250.)

At the same hearing, Judge Orr said:

> "* * * I think the activating motive in the first instance in bringing this action was the fear of imposition of this thousand dollars a day—isn't it?—or something of that kind—that penalty, and if they waited some length of time and finally lost out, that would be a rather irreparable injury, and they were in a sort of a, as Judge Goodman put it, between two pincers here * * *. If they were to stand by and let you go ahead and you saw fit later to impose those penalties, they were in a bad fix." (R. 257.)

Nevertheless, Appellants seem to think that this "bad fix" United was in was not enough to establish threatened irreparable injury. In making their contention, Ap-

5. In this connection we note that United was required under its 1946 contract to discharge all of the obligations of Catalina Air Transport under the certificate of public convenience and necessity granted to it by the Civil Aeronautics Board. (R. 59.) The State Commission's tardy intrusion into the Catalina air operation could seriously jeopardize this long standing contractual relationship and confront United with yet another threat of irreparable injury. *Columbia System* v. *United States*, 316 U. S. 407 (1942). Such "threats of damage are direct and immediate in a very practical sense." *B. F. Goodrich* v. *Federal Trade Commission*, C. A. D. C. July 16, 1953 (CCH Trade Reg. Reporter 1953, par. 67-535).

pellants must face up to the burden of establishing that the District Court's finding on the point is not supported by the record. Appellants overlook that during the hearing on the motion for a new trial, Judge Murphy stated that the District Court's finding on threatened irreparable injury was:

> "* * * *the nub of our decision.* We held as a matter of fact, intent is a question of fact, that you had threatened irreparable injury. We found that." (Emphasis added.) (R. 255.)

But Appellants now argue, contrary to the findings of the District Court, that United was not in fact subject to the risk of penalties for its failure to comply with the Commission's directives. Appellants first assert that these directives were not "orders", and secondly, that United was under no duty to file its tariffs with the Commission until the Commission after a formal proceeding, "effectively" ordered United to file. (Appellants' Brief, pp. 21-24.)

With respect to the first contention, it is enough to point out that the penalty statute and the contempt statute are not limited in their application to disregard of an "order" of the Commission, but expressly apply to failure to comply with any "direction, demand, or requirement of the Commission." (Secs. 2107 and 2113 of the California Public Utilities Code.) Certainly, the Commission's letters which "instructed" United to file its tariffs plainly amounted to a "direction, demand, or requirement of the Commission."

Appellants, in this Court, now characterize the letters as merely "administrative letters"—as if this new label removes their sting. Appellants concede that the Secretary of the Commission did not send the letter under his own limited authority (Secs. 308 and 311 of the California Pub-

no help to Appellants. Here, as we have shown, there have been two completed administrative adjudications. In any event, the declaration in *Rochester* as to what there was considered reviewable cannot logically be said to have been so all-inclusive as to have been an announcement of that which was not reviewable. Appellants further muddy the theoretical waters by injecting cases dealing with unsuccessful attempts to raise the issue of "coverage" in proceedings to enforce administrative subpoenas. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943); *Tobin* v. *Banks and Rumbaugh*, 201 F. 2d 223 (C. A. 5, 1953). There is no issue here of sterilization of administrative investigative powers; and, the only "maelstrom of confusion" observable is that into which Appellants have plunged Appellees, causing them to seek the protection of the Federal courts. A decision of the issues here will not be "premature" as in *Banks and Rumbaugh*, but rather overdue if the gestation period of Appellants' claims is considered.

The Reasons Underlying the Doctrine of Exhaustion of Administrative Remedies Are Absent Here.

In their brief, Appellants do not discuss the reasons underlying the doctrine of exhaustion of administrative remedies as a condition precedent to judicial consideration. The basic reasons for the rule are to take full advantage of administrative expertness, and to insure that an administrative agency has an opportunity to first decide the questions involved. See Cooper, *Administrative Agencies and the Courts*, (Michigan Legal Studies 1951) pp. 316-322. Close analysis demonstrates that none of these reasons is applicable in this case.

The issues involved in this case are purely legal ques-

lic Utilities Code),[6] but that the Commission itself authorized the sending of the letters. (Appellants' Brief, p. 23.) Appellants point to nothing in the Public Utilities Code or the Commission's Rules of Procedure which authorizes or defines an "administrative letter." There not only is no indication whatever that so-called "administrative letters" do not amount to a "direction, demand or requirement of the Commission," but the Commission itself, in its Brief (p. 23) states that such letters are sent "calling to the attention of the utility that it appears that such utility is violating the law and *directing corrective measures to be taken.*" (Emphasis added.)

Appellants' second contention, that United was under no duty to file tariffs until directed to do so by the Commission after a formal proceeding and investigation and final determination of the jurisdictional question by the Commission, does not weaken the finding of threatened irreparable injury below. Certainly, the District Court did not abuse its discretion in relying upon the Commission's original position that the tariffs were required to be filed. If, as the Commission somewhat belatedly contends, there was no legal duty on United to file, what gave the Commission the right to "instruct" United that it must file? If United was to be obligated to file only after a formal hearing and order, what meaning is to be

6. 308. "The commission shall appoint a secretary, who shall hold office during its pleasure. The secretary shall keep a full and true record of all proceedings of the commission, issue all necessary process, writs, warrants, and notices, and perform such other duties as the commission prescribes."

311. "The commission, each commissioner, the secretary, and the assistant secretaries may administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the State.

The examiners may administer oaths, examine witnesses, issue subpoenas, and receive evidence, under such rules as the commission adopts."

given to the Commission's statement in the concluding paragraph of its December 27, 1951, letter to United's counsel that "In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct your client, United Air Lines, Inc., to file with this Commission * * *." (R. 46.) The Commission obviously had taken its stand on a legal issue. To say that it might reach a different decision after a "formal investigation" is to ignore the fact that there was nothing to investigate. Its mind was closed.

Appellants in their argument miss this fundamental point. United was faced with a very real *risk* that penalties would be sought because of a claimed violation of a Commission directive, and with the risk of incurring the expense of defending against penalty suits in the future. (Finding of Fact 13, R. 61.)

In view of the provisions of Sec. 2101 of the California Public Utilities Code directing that penalty actions shall be "promptly prosecuted" by the Commission, the past action of the Commission in instituting penalty actions against United for claimed violations of its regulatory jurisdiction, and the potential dangers of reparation and damage suits which might be brought by the Commission, the District Court's finding that United had established threatened irreparable injury is clearly supported by the record.

Furthermore, the District Court found, in support of its equitable jurisdiction, apart from the risks of penalty and reparation suits, "United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented." (R. 61.) The Court further found that "no provisions exist under which United may recover its

expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (R. 61.) The District Court further found that the cost of defending such a proceeding will exceed $3,000, for which the Appellees will not be recompensed. (Finding of Fact 11; R. 60.) Again this is strikingly similar to the factual situation which prompted this Court to affirm the award of injunctive relief in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943). There, this Court said:

> "If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the Federal Regulatory Agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy findings and penalties or, at the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction." (317 U. S. 456, at 469.)

Appellants readily concede that they intend to require Appellees to appear and defend in a proceeding before the Commission, which is certain to be an empty formality. The Chief Counsel stands ready to "again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved • • •." (Finding of Fact 11, R. 60.) These facts certainly demon-

strate the existence of risks "sufficiently imminent and certain to justify the intervention of a court of equity." *City Bank Co.* v. *Schnader*, 291 U. S. 24, 34 (1934). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923). *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C. A. 5, 1936), certiorari denied 298 U. S. 688 (1936).

2. Appellants also attack the award of declaratory relief by the District Court. Appellants confuse the issue by implying that threatened irreparable injury is not only a prerequisite to the issuance of injunctive relief, but is also needed to justify a declaration of the rights of the parties. This is simply not so.

The contrary was made clear by this Court over twenty years ago in its landmark decision in *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 (1933). Mr. Justice Stone wrote an opinion for a unanimous Court which affirmed an award of declaratory relief under a Tennessee declaratory judgment statute to a carrier which sought to establish that a state excise tax levied on the storage of gasoline was, as applied to the carrier, invalid under the commerce clause and the Fourteenth Amendment of the Federal Constitution. The Court stated, in unequivocal language:

> "As the prayer for relief by injunction is not a necessary pre-requisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." 288 U. S. at 264.

See also *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241 (1937); *Texas* v. *Florida*, 306 U. S. 398, 411-412 (1939); *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145,

149 (C. A. 5, 1936), certiorari denied 298 U. S. 688 (1936); Note, *Need for Injunctive Relief As Pre-requisite for Granting Declaratory Judgment*, 56 Yale L. J. 139 (Borchard) 1946; *Developments—Declaratory Judgments*, 62 Harv. L. Rev. 787, 867 (1949); Borchard, *Declaratory Judgments*, (2d ed. 1941) 195-197, 365. In the recent decision by this Court in *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237 (1952), this Court implicitly recognized that proof of threatened irreparable injury essential to injunctive relief is not a prerequisite to the award of declaratory relief. Furthermore, it must be remembered that a declaration may be given whether or not an injunction is also sought. The Federal Declaratory Judgments Act expressly provides that the declaration may be issued "whether or not further relief *is or could be sought.*" (Emphasis added.) 28 U. S. C. 2201.

Moreover, as a matter of logic and common sense, there should be no requirement of a personal threat by government officials to enforce a statute to justify either injunctive or declaratory relief. Legislatures do not pass statutes with the expectation that they will not be enforced. It cannot be assumed that officials charged with the responsibility of enforcing statutes will disregard their duty. It is the statute itself which creates the jeopardy, cloud, and uncertainty, not the possible inaction of state officials. This has been made plain by this Court in such cases as *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) and *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). A situation can be instinct with the threat of enforcement without tempers flaring or ultimatums being issued. The true test for relief should be whether in view of all the surrounding circumstances, considered as a totality, a reasonable man would believe that he was in peril.

Another contention of Appellants also confuses the pro-

priety of the award of declaratory relief in this case. Appellants insist (Appellants' Brief, p. 25) that United should have placidly accepted "the expense and annoyance of litigation. * * * [as] a price citizens must pay for life in an orderly society * * *", citing such cases as *Paulos* v. *New Hampshire*, 345 U. S. 395 (1952), *Petroleum Exploration Inc.* v. *Public Service Commission of Kentucky*, 304 U. S. 209 (1937), and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). But the price of civilization is today expensive enough without including completely unwarranted and unnecessary proceedings before State agencies lacking jurisdiction over the subject matter.

Furthermore, Appellants misconceive the nature of declaratory relief. A judicial declaration of rights seeks to eliminate the expenses of needless litigation. Appellants cannot improve Professor Borchard's excellent analysis of the social utility of declaratory relief in a case such as this. Professor Borchard states:

> "Those who have rights under contract or statute are frequently faced with a threat or risk of breach or violation by the defendant. Their fear of loss and prejudice persuades them to seek to avoid a breach by suing for a declaration of their rights. Such a declaration serves as a warning to the defendant and reassures the plaintiff in the enjoyment of his rights. It removes the cloud generated by the threat or danger of improper action by the defendant, confirms the plaintiff's rights, and stabilizes a doubtful or uncertain or challenged legal relation. It thus serves a most important social function in settling disputed rights at the inception of the controversy, saves from destruction and violence an existing *status quo*, preserves contracts against threatened breach, holds parties to their contractual and statutory duties, and avoids the economic and social damage which breach would entail. It acts as a preventive and conservatory measure, saving existing relationships from the risks of breach,

violation, injury, and destruction. Issue is joined while the relationship still exists and before irretrievable losses have occurred by reason of one or the other party acting upon his own interpretation of his rights." Borchard, *Declaratory Judgments*, 1008-1009 (2d ed. 1941).

This case involving competing claims over an air transportation route by State and Federal agencies is uniquely suited for declaratory relief. The controversy was real and had reached the stage where it was ripe for adjudication. See discussion pp. 48-49, *infra*. The decision below contributed to the maintenance of an orderly society with a minimum of expense and annoyance to the air carriers, the State, and the Federal Government.

B. United Was Not Required to Take Further Steps Before the Commission Nor to Apply to the State Courts for Relief Before Instituting This Action in the Federal Courts.

Appellants next argue that the District Court should not have granted relief because Appellees failed to exhaust their State administrative remedies. This argument is advanced despite the absence of any indication by the Commission prior to the trial that it did not consider its letters to Appellees as definitive administrative determinations.

The Commission asserted jurisdiction over the Catalina operations on September 20, 1951 when it "instructed [United] to file with this Commission the tariffs covering the service in question." (R. 40.) United sought what amounted to reconsideration of this determination in its letter of December 5, 1951. (R. 42-43.) On December 27, 1951 the Commission, in effect, denied reconsideration and

concluded its December 27, 1951 letter in the following unequivocal language:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution *we again instruct* • • • United Air Lines, Inc. to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles." (R. 46, emphasis added.)

It is noteworthy that the December 27, 1951 letter was signed by the Secretary of the Commission, despite the fact that United's December 5, letter had been addressed to the Assistant Counsel for the Commission. In the Commission's letter of December 27, 1951, the Commission stated that United's December 5, letter to the Commission's Assistant Counsel "has been referred to [the Office of the Secretary of the Commission] for reply." (R. 44.) Moreover, it is significant that in the Statement as to Jurisdiction filed by Appellants in this Court, Appellants themselves pointed out that the Commission's letters *"were sent after considering the contentions of plaintiff United* • • •" (Appellants' Statement as to Jurisdiction, p. 19.)

Earlier in this brief, Appellees have pointed out that Appellants now characterize these letters as simply "administrative letters"—and as "one of the most efficient and time-saving features of administrative procedure • • •." (Appellants' Brief, p. 23.) In their brief, Appellants concede that such letters were sent on the authority of the Commission itself and that such letters direct that corrective measures be taken by the recipient. (Appellants' Brief, p. 23.) Such "administrative letters" are sent by the Commission "with the hope that corrective measures will be taken and a formal proceeding will be obviated." (Appellants' Brief, p. 24.)

Does the Commission seriously contend that these letters did not result from its deliberate decision to assert

jurisdiction over the Catalina route? Suppose United had complied with the directions to file its tariffs with the Commission. Would the Commission then have reconsidered its position? Of course not. This would have been the end of the matter. If United had been willing to bow to these directions by the Commission, the question of the Commission's jurisdiction would have been closed. For the Commission to indicate now that it has an open mind on the question of its jurisdiction is nothing more than an attempt to repudiate its prior directions. Furthermore, the contention that the California Public Utilities Commission would approach a consideration of this problem with an open mind seems even more improbable in the face of the California Statute of 1949, (Secs. 170, 171, California Government Code, Appellants' Brief, Appendix A, pp. ii, iii). In that statute, the California Legislature, in effect, declared the waters between Catalina Island and the mainland to be inland waters. Is it likely that the Commission—which describes its "processes" to be "quasi-legislative" (Appellants' Brief, p. 36)—would hold that the waters are outside the State of California and thus destroy the very purpose of the statute?

In view of these repeated directions to United to file its tariffs with the Commission, the plain language of the directives, and the fact that United's last letter had been answered officially by the Commission rather than by its counsel, there was absolutely nothing present in the situation to indicate that the Commission desired, or would even permit, further administrative action before United filed its tariffs with the Commssion, or would conceivably reverse its determination of jurisdiction over the Catalina route. Fairly read, these instructions from the Commission are not susceptible of the interpretation, now urged by the Commission, that they were not compulsive but

were merely preliminary warnings of an impending investigation of United's operations.

That the letters from the Commission were much more than a "first step in the administrative process" is well illustrated by Judge Orr's observations during the hearing on the motion for preliminary injunction. (R. 221.):

> "I know if I were in the position of the air lines and got a letter like that, I would commence to do something. I think I would better do something right away, either send [fol. 406] the tariffs or tell them the circumstances.
>
> "That seems to me like an order, a direct order, and what may be back of it, I think I am logical in saying that that does not convey to the party—no matter what their intention may have been, that letter does not convey that impression to the person receiving it. It means that the party receiving it, you better comply with this, you do this thing—that's it. And I received it, I would feel I better do that or take some other action to challenge their jurisdiction or do something else, because otherwise I might get into very serious trouble."

Judge Murphy said at the same hearing, in addressing Commission counsel (R. 222-223):

> "Well, I can't reconcile your argument, the argument that you are making now, with your letter of December the 27th, 1951, the last paragraph of which says:
>
> " 'In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct your client, United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach, Los Angeles.'
>
> "Now if that isn't a definite order, I don't know what is.
>
> " 'We again instruct your client'—
>
> "Judge Orr: That is the second time!
>
> "Judge Murphy: That is the second time.
>
> "Mr. Phelps: Yes. Well, as I say, it was couched

in terms of an order, to be sure, but in terms of an order that the Commission felt followed naturally from its expression [fol. 409] of its opinion as to its jurisdiction. But it does not seem to follow that there is an implied threat there that if you don't do it you will be subject to penalty actions.

"Judge Murphy: Any reasonable man reading a letter of that kind would certainly interpret it."

As Judge Orr and Judge Murphy observed in the hearing below, United was faced with an explicit direction to file its tariffs with the Commission. Under these circumstances, the suit was not prematurely instituted. *City Bank Co.* v. *Schnader*, 291 U. S. 24, 34 (1934); *New York Central Railway Co.* v. *New York and Pa. Co.*, 271 U. S. 124 (1926).

Furthermore, even if the letters were the beginning of an administrative proceeding, as Appellants now assert, it was not until *after* denial of United's request for reconsideration that this suit was instituted. No further exhaustion of administrative remedies on the part of United was required. As this Court pointed out in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, at 465 (1943):

"The Commission in this case has not yet done more than assert its jurisdiction over United's rates. It has not yet held a hearing upon the reasonableness of United's present rates; it has made no finding whether these rates are unlawful and whether new rates should be substituted; it has not entered upon inquiry to determine what rates would be just and reasonable." (317 U. S. at 465.)

Nevertheless, in the *United Fuel Gas* case this Court affirmed the award of injunctive relief.

Rice v. *Santa Fe Elevator Corporation*, 331 U. S. 218 (1947), is an even stronger case in point. In *Rice*, a complaint was filed against certain grain elevators before

the Illinois Commerce Commission. The elevators' motion to dismiss the complaint on the ground that the State Commission had no jurisdiction was denied by the Commission, which then set a date for a formal administrative hearing. Without more, the elevators went to the Federal District Court and asked that further proceedings before the Illinois Commission be enjoined on the ground that the United States Warehouse Act superseded state regulation of warehousemen licensed thereunder as to the matters presented in the complaint. The District Court dismissed the suits, but the Court of Appeals reversed. The decision of the Court of Appeals was affirmed by this Court, 331 U. S. 218 (1947).[7] Similarly, in *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148 (1942), this Court affirmed an award of injunctive relief by a Federal District Court without any showing of exhaustion of State administrative remedies.

In an even more recent case, *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949), this Court clearly pointed out that exhaustion of administrative remedies is not an ironclad requirement but rather a flexible rule of judicial discretion. In the *Panhandle* case, the Federal Power Commission sought an injunction in a federal District Court to preserve the status quo until the Commission could itself investigate and determine whether a proposed transfer of natural gas leases might have violated the Natural Gas Act. This Court affirmed the denial of injunctive relief after deciding that the Commission's jurisdiction did not extend to the transfer of the leases—a matter which the Commission itself had not yet passed upon. In denying the Commission's contention that the transfer should not have been enjoined until the Com-

7. The Court of Appeals decision was in part reversed with respect to the application of the United States Warehouse Act to certain activities of the elevators, but this point is not material here. 331 U. S. 238.

mission could determine its own jurisdiction, this Court pointedly remarked that the Commission "should not be permitted to delay what it cannot prevent." 337 U. S. at 515.

These decisions make it plain that an absolute exhaustion of State administrative remedies is not always a prerequisite to the proper exercise of Federal jurisdiction. See *Exhaustion of State Remedies and the Three Judge Court*, 46 Ill. L. Rev. 756, 761 (1951).

Cases Relied On By Appellants.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), which Appellants rely upon so heavily, is completely distinguishable from this case. In the *Myers* case, this Court stated the issue to be

> "whether a federal District Court had equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act * * *." 303 U. S. at 43.

This Court decided that a district court had no such jurisdiction because, in the Court's words, "the power 'to prevent any person from engaging in any unfair practice affecting commerce' has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.' ". 303 U. S. at 48. Therefore, the *Myers* case has nothing to do with this case, where the existence of federal jurisdiction is clear. The problem here is not whether the District Court has power to decide the case, but whether the District Court should have declined to exercise its power. The exhaus-

tion doctrine has no application where a suit is instituted in a court which has no jurisdiction to entertain the case in the first place. The discussion in the *Myers* opinion concerning exhaustion of administrative remedies was therefore unnecessary to disposition of the case because the federal statute there involved explicitly denied jurisdiction to the District Court.

Similarly, in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946) the applicable statute empowered the administrative board to rule on the question of coverage; and, in *Macauley*, review *de novo* was provided in the Tax Court which Congress intended to have *exclusive jurisdiction* to decide questions of fact and law. Therefore, as in *Myers*, the District Court lacked power to hear the suit, and the "exhaustion" argument would appear to have been dicta. *Federal Power Commission* v. *Arkansas Power and Light Company*, 330 U. S. 802 (1947) is likewise inapplicable. There, the District Court held that it had no jurisdiction because the Federal Power Act provided that review of an order of the Federal Power Commission was available only in the Court of Appeals and in this Court. 60 F. Supp. 907 (D. C. D. C., 1945); See 156 F. 2d 821 (C. A. D. C. 1946) for opinion of the Court of Appeals. The "exhaustion" doctrine presupposes that the court to which it is addressed has jurisdiction of the case. If the court does not have jurisdiction the exhaustion or non-exhaustion of administrative remedies is totally irrelevant.

Other cases relied on by Appellants in this connection are even more beside the point than *Myers*, *Macauley*, and *Arkansas*, *supra*. Obviously *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125 (1939), holding that an administrative order objected to was reviewable because it was not a mere abstract declaration nor a stage in an incomplete process of administrative adjudication, is of

tions concerning Federal vis-a-vis State jurisdiction over the Catalina route. The facts are not in dispute. Appellees presented to the District Court only questions of law under the Constitution and statutes of the United States. Therefore, there was no advantage to be gained in this type of problem in utilizing the expertness of the State body. This is not, for example, a rate case in which the State Commission has special competence and skills. This is nothing more than deciding pure legal questions and judicial relief should therefore not be withheld. See *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285 (1922); see Note, *Administrative Action as a Prerequisite of Judicial Review*, 35 Col. L. Rev. 230, 233-234 (1935).

Members of the Commission would undoubtedly follow the advice of their counsel in deciding these legal questions. Their counsel has already advised the members of the Commission, and stands ready to advise them again, that the Commission has jurisdiction over the route (R. 200). All that remains is a formalized hearing to put an official stamp of approval on a decision which has already been reached. Under these circumstances, this Court has held that judicial relief is not premature. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24 (1934). See also *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C. A. 5, 1936), certiorari denied, 298 U. S. 688 (1936).

The "surprise" of Appellants expressed at page 33 of their Brief at the present position of the Civil Aeronautics Board is based upon a misconception of the issues here involved. Of course, the Civil Aeronautics Board has no objection to Appellees' taking this matter to the federal courts. Appellee United is, and for many years has been, operating completely within the sphere of the Board's administrative process. For the purposes of this case, there has been a total exhaustion of the federal adminis-

trative process—and continued, unchallenged federal regulation for over twelve years. Therefore, Appellants' contentions do not relate merely to the exhaustion of an administrative process, but rather introduce the question of how *many* administrative processes must be exhausted.

Of course, it is familiar doctrine that a plaintiff need not exhaust his judicial remedies, as contrasted with legislative or administrative remedies, before resorting to the federal courts. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43 (1923); *Railroad and Warehouse Comm'n of Minnesota* v. *Duluth Street Ry.*, 273 U. S. 625 (1927); See also *Banton* v. *Belt Line Ry.*, 268 U. S. 413 (1925); cf. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440-441 (1923); Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 Harv. L. Rev. 379 (1930), particularly pp. 385-402.

The Remedy Available in the California Courts Is Inadequate.

Careful analysis of the California remedies demonstrates that the law of California does not provide for judicial review under the circumstances of this case. In the first place, judicial review in the California courts is limited exclusively by Sec. 1756 of the California Public Utilities Code (Appellants' Brief, Appendix A, p. vi) to applications for "a writ of certiorari or review for the purpose of having the lawfulness of the original *order or decision* or of the *order or decision* on rehearing inquired into and determined." (Emphasis added.) However, as pointed out earlier in this Brief, Sec. 2107 of the Code provides penalties for a failure or neglect to "comply with any part or provision of any order, decision, decree, rule, *direction, demand or requirement* of the Commission." (Emphasis added.) Although penalties can thus be im-

posed for violations of a "direction, demand or require ment" of the Commission, there is no way under Cali fornia law to obtain judicial review of such a "direction demand or requirement." Therefore, it is apparent tha Appellees faced the risk of penalties without any oppor tunity to have the Commission's letters reviewed in th California courts.

Moreover, even if the Commission's letters are viewe as "orders," nevertheless Appellees could not obtain judi cial review in California. As far back as 1916, th California Supreme Court made it clear that the Stat Railroad Commission (now the Public Utilities Com mission) had no authority to conduct proceedings deal ing only with the extent of its jurisdiction, and tha a carrier could not appeal to the court from a Com mission order which dealt only with jurisdictional issue because such an order was merely intermediate an interlocutory. *Holabird* v. *Railroad Commission*, 171 Cal 791 (1916). See also *Producers Transportation Co.* v *Railroad Commission*, 176 Cal. 499 (1917). In short, th law of California is that United in this case could not hav secured judicial review of the Commission's direction t file its tariffs with the State Commission, and would hav had to await a final decision on the merits before goin to the California Supreme Court. *See* Wheat, *Practice an Procedure Before the Railroad Commission of California* 15 Cal. L. Rev. 444, 456 (1927). United could have se cured review by the California courts only *after* submittin to the jurisdiction of the Commission and only *after* filin its tariffs and justifying its rates before the Commissio Until then, any effort by United to seek review in the Cal ifornia courts would have been premature, for as th California Supreme Court said in the *Holabird* case:

> "There is nothing in Section 67, or in any othe part of the Public Utilities Act, which in any way in

dicates an intention by the legislature to enlarge the writ [of review] so as to authorize this court to intervene in the course of a proceeding before the rail-commission, stop the proceedings, and determine whether or not its intermediate rulings are within its powers. Neither does the act empower the commission to make general adjudications regarding the character of the several water corporations or persons using or disposing of water, or conducting other business enterprises, within the state, for the purpose of ascertaining whether or not they, or any of them, are public utilities within the meaning of the Public Utilities Act, and therefore, subject to the jurisdiction of the commission. No proceeding is authorized for the mere purpose of determining this question with respect to any person or corporation." 171 Cal. at 696.

Under these circumstances, it can hardly be argued that the California remedy is adequate or that it is "plain, speedy, and efficient." In order to secure review in the California Supreme Court—which is at best merely discretionary—United would have had to engage in a drawn-out, expensive litigation and would have had to justify its existing tariffs already established by the Civil Aeronautics Board. Once again, Appellees point to *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943), which in an analogous situation emphasizes that the carrier should not be put to heavy and unnecessary expense which would ultimately be borne by the consuming public.

The Recent Alabama and Utah Decisions.

Appellants rely heavily on two recent decisions of this Court, *Public Service Commission of Utah*, v. *Wycoff*, 344 U. S. 237 (1952), and *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341 (1951). In view of Appellants' marked emphasis of these two cases,

Appellees believe that both decisions should be discussed in some detail.

In the *Alabama* case, a railway company, pursuant to an Alabama statute, had requested that the State Commission authorize discontinuation of two passenger trains, both running only on an *intrastate* route in Alabama. 341 U. S. 342-343. The company's request, advanced on the ground that the public need for the service no longer justified the financial loss which their operation occasioned, was denied by the Commission. The company then went to a three-judge District Court which invalidated the Commission's order and enjoined enforcement of it. This Court reversed on the ground that the District Court should have declined to exercise its jurisdiction, thereby leaving the parties to test the validity of the order in the State courts.

The *Alabama* case is vastly different from the problems presented in this proceeding. There, the carrier had itself initiated the State proceeding and turned to the federal courts only after losing before the Commission, despite the fact that "[s]tatutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code." 341 U. S. at 348. There, the transportation involved was exclusively *intrastate* and the issues involved only "predominantly local factors." 341 U. S. at 349. There, no national issues concerning the jurisdiction of a Federal agency were presented. On the contrary, *this* case involves a clash initiated by the State—not the carrier—between Federal and State authority over an important segment of commerce that has been subject to exclusive and unchallenged federal regulation for over 12 years. Here the federal agency considers the federal problem of sufficient importance to actively intervene in the litigation. Here, the issues do not in-

volve "predominantly local factors"—the issues in this case are of pressing concern to federal authority under a federal statute.

The *Utah* case is similarly inapposite. The *Utah* case was an action brought by a motor carrier in a District Court seeking a purely abstract declaration that its carriage of goods between points within as well as without Utah was all in interstate commerce. The carrier offered no evidence whatever to establish any past, pending, or threatened action by the Utah Commission touching its business in any respect, and the District Court made a general finding that no such interference had been made or threatened. 344 U. S. at 240. The carrier did not attack the constitutionality of any State statute, nor did it urge that an injunction be granted "outside of the naked recitation in the prayer of the complaint." 344 U. S. at 240.

Therefore, the *Utah* case dealt only with the propriety of awarding declaratory relief. This Court decided that the carrier had not made out a case for such relief because "the dispute has not matured to a point where we can see what, if any, concrete controversy will develop." This Court further pointed out that declaratory relief would not serve any "useful purpose" in the future. 344 U. S. at 245, 246.

The differences between *Utah* and the instant case are starkly apparent. Here, proof was introduced and a finding was made of threatened and impending injury. Here, a State statute was attacked as being unconstitutional, and the request for an injunction was vigorously pressed. Here, the dispute was live and concrete, with no uncertainty as to the claims of either side. Here, the State Commission had specifically directed the carrier to take definite action. Here, the injunctive and declaratory relief served an ex-

ceedingly useful purpose by ending an important jurisdictional dispute between a State and Federal agency. Unlike the *Utah* case, here there is nothing "nebulous or contingent" about the controversy, which more than satisfies all the *Utah* tests because it had already taken on "fixed and final shape" so that the court "can see what legal issues it is deciding, what effect its decision will have on the adversaries and [that] some useful purpose [will] be achieved in deciding them." 344 U. S. at 244.

It is true, as Appellants point ont, that the majority opinion in the *Utah* case states:

> "* * * Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim." (344 U. S. 237, 248.)

But how does this doubt apply to this case? Here the character of the threatened action itself concerns federal questions under the Commerce Clause, the Fourteenth Amendment and the Civil Aeronautics Act. This is made clear in the Commission's December 27th letter in which the Commission itself concluded that it had jurisdiction only after analyzing the provisions of the Civil Aeronautics Act and the meaning of "interstate or foreign commerce in the general sense or in the Constitutional sense." (R. 44.) Therefore, the character of the threatened action itself involves claims under federal law, or at least involves claims so interwoven and intermingled with federal law as to be inseparable.

Furthermore, the Civil Aeronautics Board does not

habitually rush to the defense of air carriers in disputes with State agencies. The Board does so only when important federal questions are presented of interest to the national concern with interstate air transportation. Realistically viewed, the controversy here is not between the State Commission and the air carriers—the fight is between the State Commission and the Civil Aeronautics Board with the air carriers caught in the middle. Here again, therefore, is another demonstration of the inapplicability of the *Utah* case. Like the other authorities relied upon by Appellants, discussed in other parts of this Brief, the holding of the *Utah* case has only superficial relevance which cannot withstand close analysis when contrasted with the problems presented by this case.[8]

The Johnson Act.

Appellants also contend that the District Court should not have awarded injunctive relief in view of the Johnson Act, 28 U. S. C. 1342. This contention is patently frivolous because of the express language of the Johnson Act itself, which provides that:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,
>
> "(2) the order does not interfere with interstate commerce; and,
>
> "(3) the order has been made after reasonable notice and hearing; and,
>
> "(4) a plain, speedy and efficient remedy may be had in the courts of such state."

8. For a more detailed discussion of the distinctions between the *Utah* case and this case, see Plaintiffs' Answer to Defendants' Motion for New Trial, R. 91-104.

Appellees have demonstrated earlier in this brief that: (1) jurisdiction is not based *solely* on diversity of citizenship or repugnance of the order to the Federal constitution; (2) the Commission's action *does* interfere with interstate commerce; (3) the directive was *not* made after reasonable notice and hearing; and (4) a plain, speedy and efficient remedy is *not* available in the courts of the State of California. Therefore, not a single requirement of the Johnson Act is not in this case.

C. The Decision Below Is Consistent with the Preservation of a Proper Federal-State Relationship.

Underlying all of Appellants' jurisdictional contentions is the basic problem of maintaining harmonious relations between State and Federal authority and preserving the rightful independence of State government. A practical and realistic analysis of the decision below demonstrates that the District Court's action in no sense upsets the delicate balance required in our federal system. On the contrary, the District Court's decision eliminated incipient discord by promptly and expeditiously defining the boundaries of Federal and State authority.

Appellants' arguments misconceive the jurisdictional issue by asserting that federal jurisdiction does not exist in this suit. Entirely apart from Appellees' constitutional claims that the California penalty statute, if applicable, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, there were additional constitutional claims presented by Appellees' allegation that the State's directives to United unreasonably burdened interstate commerce and obstructed Congressional use of its constitutional power to regulate interstate and foreign commerce. Moreover, even aside from these constitutional claims, federal jurisdiction plainly existed under Sections

1331 and 1337 of Title 28 of the U. S. Code. Section 1331 provides:

> "The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States."

Section 1337 provides:

> "The District Courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Indeed, this case abounds with federal questions concerning the Appellees' rights under the Federal Constitution and the meaning of a major federal statute. The real question is not whether federal jurisdiction exists, but whether the court below, in the exercise of its sound discretion, should have declined to exercise its jurisdiction.

Appellees recognize that there are certain areas in which the doctrine of equitable abstention has properly motivated federal courts not to decide a case concerning certain state matters. For example, where a state court's ruling on an uninterpreted state statute or an undecided question of state law might enable the federal courts to avoid passing upon an important constitutional question, the federal court should avoid decision. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941). In addition, a federal court should refrain from deciding a case which involves a specialized aspect of a technical complicated system of local law outside the normal competence of a federal court, *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 332 (1943). As discussed earlier in this Brief, a federal court should stay its hand in a case involving exclusively intrastate operations and predominantly local factors where a carrier had

itself initiated a state proceeding but failed to take the statutory appeal which was an integral part of the regulatory process under state law. *Alabama Commission* v. *Southern Railway Co.*, 341 U. S. 341, 348-349 (1951). And, a federal court should not award declaratory relief in a suit involving only abstract questions without an actual controversy between the parties. *Public Service Commission of Utah* v. *Wycoff*, 344 U. S. 237 (1952).

But none of the considerations underlying the doctrine of equitable abstention present in *Pullman, Burford, Alabama,* and *Wycoff,* are involved in this case. There are no questions concerning a specialized field of state law with which federal judges are not familiar. There is no need for administrative expertise to solve this dispute. There are no unresolved questions of State law. Here, the transportation is interstate, and there are no predominantly local factors which are of major importance. Here, the controversy is live and active. In this situation, there are no exceptional circumstances present to deter a federal court from exercising its power of decision. There should be no self-imposed judicial barrier in this type of controversy to granting the swift remedies accorded by Congress.

Most important of all, this case turns on the meaning and construction of a federal statute and its application to interstate and foreign commerce. Federal courts are uniquely equipped to decide national issues involving the construction of a federal statute. Here, the very issue which the court below regarded as decisive concerned the interpretation of an Act of Congress vesting exclusive jurisdiction in a federal regulatory agency. This is precisely the type of claim which the federal courts should be constantly alert to evaluate and protect. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148 (1942); *Mayo* v. *United States*,

U. S. 441 (1943); *First Iowa Hydro-Electric Coopera-* v. *F. P. C.*, 328 U. S. 152 (1946); *Napier* v. *Atlantic* st *Line R. Co.*, 272 U. S. 605 (1926); *Hines* v. *Davido-*, 312 U. S. 52 (1941).

ut Appellants would have the District Court sit idly when federal claims like this one are presented to it. s doctrine would weaken rather than strengthen our ral system. Here, federal regulation has gone un-llenged by the State for over 12 years. To hold now the federal courts are closed to Appellees' claim sim-because the State, in "johnny come lately" fashion, has ded to intermeddle in this route would reflect an over-ning deference to State authority. This would reduce previously unchallenged authority of the Civil Aero-ics Board to a second-class status. Federal agencies as the Civil Aeronautics Board should not have to to the California Commission and California courts in hand to vindicate their authority under federal over interstate air transportation whenever the State ncy sees fit to challenge it. This is much more than scrupulous regard for the rightful independence of e governments which should at all times actuate federal courts * * * ." *Matthews* v. *Rodgers*, U. S. 521, 525 (1932). This would be a scrupulous dis-ard for the rightful independence of previously un-llenged federal authority which is unquestionably enti-to the consideration of the federal courts.

he present aggressiveness of Appellants is in marked rast to their previous years of passivity—particularly 939, 1941 and 1946—when certificates of Public Con-ience and Necessity were granted or renewed to Appel- by the Civil Aeronautics Board. Prior to the issuance hose certificates, Appellants might have filed a protest nemorandum of opposition as an "interested person".

49 U. S. C. 481(c). Furthermore, the rules of the Civil Aeronautics Board specifically provide for the appearance of state agencies at hearings before the Board (Section 302.14).[9] In addition to appearing before the Civil Aeronautics Board at the times when the issuance of certificates to Appellees were being considered, Section 703[10] of the California Public Utilities Code permits Appellants to apply for relief to any court of competent jurisdiction when, in the opinion of Appellants, existing or proposed "interstate rates, fares, tolls, charges, and classification" are in violation of any act of Congress. Despite the availability through the years of these courses of action, Appellants chose to sleep on the rights they now proclaim so strenuously. In a case like the present where judicial discretion has such wide play, the fact of Appellants' somnolence should have special significance.

This case boils down to determining whether the California Public Utilities Commission has authority to compel United to file its tariffs with that Commission. An air carrier cannot serve two masters. It is subject to either

9. "Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly." Pike & Fischer, Administrative Law, 2d Series. Agency Rules, C. A. B. 4, 5.

10. 703. "The commission may investigate all existing or proposed interstate rates, fares, tolls, charges, and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations where any act in relation thereto takes place within this State and when they are, in the opinion of the commission, excessive or discriminatory or in violation of the Interstate Commerce Act, or any other act of Congress, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply for relief by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction. (Former Sec. 34)"

deral or state regulation, not both. If the Commission s no jurisdiction over the Catalina tariffs, it would fol- w that United would be required to pursue administrative medies set up in a tribunal which has no legal authority er United. United should not be compelled to submit the Commission if that Commission has no jurisdiction. is no answer to suggest that by a circuitous and ex- nsive proceeding, United might ultimately obtain by rtiorari a ruling from the California Supreme Court as the jurisdiction of the State Commission, and then ssible review in this Court. If this is demanded in this pe of controversy, the result will not be the exhaustion administrative remedies, but rather the exhaustion of igants.

I. TRANSPORTATION BETWEEN CATALINA ISLAND AND THE MAINLAND OF CALIFORNIA GOES THROUGH THE AIR SPACE OVER A PLACE OUTSIDE THE STATE OF CALIFORNIA AND HENCE IS "INTERSTATE AIR TRANSPORTATION" WITHIN THE MEANING OF THE CIVIL AERONAUTICS ACT.[11]

The Area Between Catalina Island and the Mainland of California, Except That Portion Within the Three-Mile Marginal Belts Along the Mainland Coast and Around the Island, Is a Place Outside the Boundaries of California.

This matter is one involved in a proceeding now pending this Court to determine the precise seaward boundaries California, *United States* v. *California*, No. 6, Original. lifornia and the United States have filed exceptions

11. "Interstate air transportation" is defined in the Act as the arriage by aircraft of persons or property as a common carrier compensation or hire or the carriage of mail by aircraft, in mmerce * * * between places in the same State of the United ates through the air space over any place outside thereof * * *." U. S. C. 401 (21).

to the report of a Special Master. The hearing before the master was preceded by the decision of this Court in *United States* v. *California*, No. 12, Original, 332 U. S. 19 (1947), wherein it was held that the Federal Government had the paramount right in and power over the belt of land extending three miles seaward from the ordinary low water mark on the coast of California; however, neither the opinion of the Court nor the decree thereafter entered precisely defined the baseline from which the seaward measurement should begin. In *United States* v. *California*, No. 6, Original, the Special Master rejected the claim of California, urged again here, that the boundary of the state extends three miles seaward of lines drawn along the western side of the outermost off-shore islands and includes as inland waters the ocean between the mainland and the outermost off-shore islands. The Special Master found that the rule stated by the Secretary of State in a letter to the Attorney General, dated November 13, 1951, "is and has traditionally been the position of the United States in international relations • • •". *United States* v. *California*, No. 6, Original Report of Special Master (under Order 2, December 3, 1951), p. 27. The mentioned letter said: "Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland." (p. 171, Brief of United States Before The Special Master, *United States* v. *California*, No. 6, Original.)

The Brief filed by the United States in *United States* v. *California*, No. 6, Original, sets forth in an able and exhaustive manner authorities to support the view that—apart from the marginal waters off the mainland and around Catalina—the waters between the mainland and the island are outside the borders of California. In addition, the Brief of Appellee Civil Aeronautics Board in this case

very adequately treats the issues on the merits. Duplication or reiteration of those efforts does not seem appropriate. However, the view of Appellees will nevertheless be briefly stated.

B. The Applicable Rule of International Law.

It is a general proposition of international law that nations are entitled to exercise territorial sovereignty over waters within a marine or nautical league (three miles) from their boundaries. 1, Moore, *International Law Digest*, p. 698. Here, of course, the question is whether the boundary of California sweeps westward from the mainland to include offshore islands or whether such islands must be considered to have their own boundaries.

The *Anglo-Norwegian Fisheries* case (Judgment of Dec. 18, 1951, I. C. J. Reports 1951, p. 116), is regarded by both Appellants and Appellees as an authoritative precedent with respect to the principles of international law involved. There the International Court of Justice was faced with a claim by Great Britain that the "base lines" (or boundaries from which territorial seas are measured) adopted by Norway along its North Sea approaches were unjustified. The nature of the coastal region in question was described by the court:

> "• • • the large and small islands, mountainous in character; the islets, rocks and reefs, some always above water, others emerging only at low tide are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small which make up the *skjaergaard* (literally, rock rampart) is estimated by the Norwegian government to be one hundred and twenty thousand." (p. 124.)

The court said the *skjaergaard* constituted "a whole" with the mainland. (p. 128.) It was noted that the coastal area of Norway, unlike that of nearly all other countries, did not constitute a clear dividing line between land and sea.

Both sides were agreed that Norway was entitled on historical grounds to claim either as internal or territorial waters the area of water lying between the island fringe and the mainland. (p. 130.) The dispute was over the manner of drawing the baseline along the *skjaergaard*.

In the *Fisheries* case Norway disclaimed any intention to urge any new rules on the court:

> "[The] Norwegian Government does not only rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law." (p. 133.)

The general nature of the problem before it was described by the court as follows:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the determination with regard to other states depends upon international law." (p. 132.)

The court pointed out that although a state must be allowed to adapt its base lines to practical needs and local requirements, they must not depart from the general direction of the coastline. (p. 133.) The "real question" raised in the choice of base lines was said to be whether the sea areas lying within them are sufficiently closely linked to the land domain to be subject to the regime of internal waters; this test should be "liberally applied in the case of a coast which is as unusual as that of Norway." (p. 133.)

The Court concluded that: (1) the Norwegian system of drawing its base lines was imposed by the peculiar geography of the Norwegian coast; (2) it had been con-

solidated by a constant and long practice since at least 1869; (3) the method was tolerated by other nations, including Great Britain, for sixty-nine years; and, (4) because of the foregoing, it was not contrary to international law.

C. The California Coast Line.

Before Appellants may look to the decision of the *Fisheries* case for support of their present claims, their first problem would appear to be one of showing a relationship between the California coast line and insular formations and those claims. Certainly there is nothing so unique about the California geography as to impose the system now being sought. The nature of California's coast line, including offshore islands, is, of course, a matter for judicial notice. *Jones* v. *United States*, 137 U. S. 202 (1890); *United States* v. *Carrillo*, 13 F. Supp. 121 (D. C. S. D. Cal. 1935).

D. California Cannot Act for the United States in Extending National Boundaries in the Marginal Seas.

Obviously the position taken by the United States with respect to its marginal seas is a matter of international concern. (See the Tidelands cases: *United States* v. *California*, 332 U. S. 19 (1947); *United States* v. *Louisiana*, 339 U. S. 699 (1950); *United States* v. *Texas*, 339 U. S. 707 (1950).) Although the United States might rely on action by one of the states in asserting the external power exclusively reserved to the Federal Government, with respect to foreign relations generally, the State of California has no standing. *United States* v. *Belmont*, 301 U. S. 324 (1937).

Manchester v. *Massachusetts*, 139 U. S. 240 (1891), relied on by California in this connection, states at page 264: "Within what are generally recognized as the territorial

limits of states by the law of nations, a State can define its boundaries on the sea and the boundaries of its countries." Disputed there was a claim of jurisdiction by Massachusetts over "Buzzards Bay". However, the question here is what are the territorial limits of the United States that have been generally recognized by the law of nations. In *Manchester* v. *Massachusetts, supra*, it was pointed out that bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues apart, have *always* been regarded as a part of the territory of the nation in which they lie. 139 U. S. at 257. The headlands of Buzzards Bay were less than two marine leagues wide. Hence by operation of the general rule, the enclosed bay was a part of the territory of the United States. This case then was merely an early judicial recognition of the principle which was the subject of the Submerged Lands Act (California Brief, Appendix A. pp. xvii, xviii) and is of no help to California here.

E. Relevant Expressions of the Position of the United States by the Executive Department.

While Secretary of State, Mr. Jefferson wrote a letter to the British Minister in 1793 advising that the President had instructed officers under his authority to exercise the territorial protection of the United States to the distance of "one sea league or three geographical miles from the seashores." (1, Moore, *Digest of International Law*, p. 702; pp. 55-60 Brief of United States Before the Special Master, *United States* v. *California, supra.*)

A firm position with respect to offshore islands is stated in a letter from Secretary of State Bayard to Secretary of the Treasury Manning dated May 28, 1886. Secretary Bayard said that the territorial authority of the United States must "follow closely, at a distance of three miles, the

boundary of the shore of the continent *or of adjacent islands* * * *." (Emphasis added.) 1, Moore, *Digest of International Law*, p. 721. This same position was taken by the United States at the Hague Conference in 1930. (Acts of Conference, p. 200.) The view of the Secretary of State in 1951 has already been mentioned above.

It is claimed by California that the position assumed by the United States in the Alaska Boundary Arbitration that the relevant coast line for boundary purposes is the "political coast line" which treats all off-lying islands as part of the mainland (14 Alaska Boundary Arbitration 31), when construed with the *Fisheries* decision, supports their present claim that the waters between Catalina and the mainland are within the boundaries of California. That argument fails to take into account either the similarity of the Alaskan Archipelago to the coast of Norway or the rationale of the decision in the *Fisheries* case. It would be perfectly consistent with that decision for the United States to adopt a different practice for coast lines with diverse characteristics.

The arrangements between England and Spain in 1790 (see Appellants' Brief, p. 98) with respect to fishing off the coast of what is now California are of no more relevance here than arrangements between the early Spanish settlers and Indian tribes or those between the Indian tribes themselves; what is important is the claim the United States has asserted or is asserting.

F. Recognition of the Position of the United States by Federal and California Courts.

In 1915, the United States Supreme Court declared that in traveling from the mainland of California to Santa Catalina Island vessels "must traverse the high seas for upwards of twenty miles." *Wilmington Transp. Company*

v. *California RR. Commission*, 236 U. S. 151, 152 (1915). Below, the California Supreme Court had recognized that a portion of the voyage was on the "high seas". 166 Cal. 741 (1913).

After considering, among other things, the letter of Secretary of State Bayard to Manning cited *supra*, a California appellate court settled a dispute as to whether there was *any* marginal belt around Catalina Island. Since the California Constitution (see Appellants' Brief, Appendix A, p. ii) did not preclude the possibility of such a belt, and laws in derogation of sovereignty are to be construed strictly in favor of the state, it was assumed that the "general rule" applied. Application of the "general rule" resulted in a declaration that the sovereignty and jurisdiction of California extended over a belt of water three miles wide circling the island. *In re Marincovich*, 45 Cal. App. 474 (1920). Also in 1920, another California appellate court independently determined without extended discussion that there was no reason for making Catalina Island an *exception to the rule* that the state jurisdiction extends three miles from the coast line. *Sutton* v. *Peckham*, 48 Cal. App. 88 (1920).

Other decisions have utilized what has been called the "headlands theory" to extend the jurisdiction of California three miles seaward of lines drawn across the headlands of San Pedro and Santa Monica bays. *People* v. *Stralla*, 96 P. 2d 941 (1939); *United States* v. *Carrillo*, 13 F. Supp. 121 (D. C. S. D. Cal. 1935). Recourse to this doctrine would not have been necessary if it had been considered that offshore islands did not have their own three mile belt but were embraced within a baseline sweeping seaward from the mainland shore around the outermost islands.

California points out that the State of California had

presented an alternative argument in *People* v. *Stralla*, *supra*, that "by the very words of the Constitution the islands are included within the boundary" and that "by including the island within the boundary the water lying easterly of the islands is necessarily within the boundary." (Appellants' Brief, pp. 50-51.) This argument, it is said, was adopted by the United States when the United States Attorney who appeared adopted the California Brief. It does not seem reasonable to derive from this alternative argument, not adopted by the California court, an assertion of jurisdiction by California over the waters now in question. Nor can the position of the United States Attorney, when viewed in the context of his request for permission to appear, and the consent of the Attorney General, be considered to be anything so startling as adoption by the United States of the view now advocated by California. (See the letter dated April 19, 1939 to the Attorney General, Washington, D. C. from the United States Attorney, Southern District of California, Los Angeles and the reply thereto set out in the Appendix to the Reply Brief of the United States in *United States* v. *California*, No. 6, Original at pp. 84-86.)

It is further argued by California that the holding of the court in *People* v. *Stralla* demonstrated a wish "to preserve California's jurisdiction beyond the area in dispute." (Appellants' Brief, p. 51.) This conclusion is based upon the statement in the opinion that California's jurisdiction extends *at least* three miles oceanward of a line drawn across the headlands of the particular bay. It is believed that the mere statement of this argument and the basis for it constitutes a sufficient refutation. If there had been any existent California jurisdiction beyond the area in dispute the court would surely have acknowledged it. Such careful hedging by a cautious jurist can hardly support the bold claims now asserted.

Examination of an early California case relied on by Appellants (Brief, p. 49) will demonstrate how that reliance has been misplaced. In *Ex Parte Keil*, 85 Cal. 309 (1890), the issue before the court in a habeas corpus proceeding was whether the California kidnapping law applied to the deeds of the petitioner. He had brought by force of arms certain sailors from the mainland to Catalina Island. An element of the offense of kidnapping was a design to take a person out of the state. The court noted the following contentions which were obviously pressed by the State: the waters of the ocean at all points more than a marine league from the shore are out of the state; consequently, in conveying the sailors from the mainland to the island the petitioner took them, and necessarily intended to take them, out of the state. It was said that this represented "a nice and imporant question as to which the court is not agreed, and as its decision is not essential to a disposition of this case, it will be left for future consideration." 85 Cal. at 312. The decision was ultimately bottomed on the theory that the design shown was not a design to take a person out of the state in the sense of the statute. Two judges concurring in the result were of the opinion that "a design to take a person across that part of the Pacific Ocean which lies between the mainland and the island of Santa Catalina is 'a design to take him out of this State' within the meaning of that part of the Penal Code which defines kidnapping." 85 Cal. at 313.

California maintains that *Ex Parte Keil* shows that the five judges who concurred in the majority opinion believed the waters between Santa Catalina Island and the California mainland were within the State of California. The case itself, however, is at most an unreliable basis for the proposition that certain of the judges concurring in the majority opinion may have had private leanings toward that view. On the other hand, the legal representatives

of the State arguing the case and two judges clearly characterized those waters as high seas beyond the boundaries of California.

G. Neither the Approval of California's Constitution Upon Its Joining the Union Nor Passage of the Submerged Lands Act Indicated a Change in the Position of the United States.

The acceptance of the California Constitution by the United States upon its admission to the Union cannot reasonably be construed as a Federal assertion or recognition that the boundary of California runs outside the outermost offshore islands, rather than around such islands individually. The words of the particular article of the California Constitution as adopted and amended obviously repel any such assumption. As was demonstrated in the discussion of *In Re Marincovich, supra,* the choice presented to an interpreter of the pertinent article is not whether the California boundary or base line sweeps seaward to include offshore islands, but rather whether such offshore islands can be said to have the three-mile belt specifically provided for the mainland shore.

The recent enactment of the Submerged Lands Act (See Appellants' Brief, Appendix A, pp. xvii, xviii) did not approve the attempts by California in 1949 to redefine her boundaries. Neither did any previous congressional enactments; nor have any since. That Act did not purport to define the "coast line" from which "Any State admitted subsequent to the formation of the Union * * * may extend its seaward boundaries * * *." Since the issue here concerns the location of California's "coast line," that Act does not affect the question in this case.

H. The View Now Urged by California Is Inconsistent with the Traditional Advocacy of Freedom of the Seas by the United States and Would Not Contribute to the Security of the United States.

Authorities need not be arrayed to support the proposition that the United States has traditionally striven for "freedom of the seas." (See *United States* v. *California*, 332 U. S. 19, 34 (1946).) The restrictions which California urges would clearly limit such freedom by United States vessels as other nations reciprocated. Furthermore, in a letter dated April 25, 1952, from the Department of the Navy on behalf of the Department of Defense to the Honorable Emanuel Celler, Chairman, Committee of the Judiciary, House of Representatives (See Appendix to Reply Brief of United States, *United States* v. *California*, No. 6 Original, pp. 80-84) a position directly contrary to that of Appellants was forcefully stated. The House Committee was considering a joint resolution seeking to accomplish for all the United States what Appellants now seek for themselves. The letter said in part:

> "The United States has always been one of the World's foremost advocates of the doctrine of the freedom of the seas and has vigorously opposed all efforts to restrict the free navigation of its war vessels and merchantmen. *The concept of the freedom of the seas likewise applies to the freedom of the air spaces above the seas.* Because of this, and other reasons, the United States Government, including the Department of the Navy, has always advocated the three-mile limit of territorial waters delimited in such a way that the outer limits thereof closely follow the sinuosities of the coast line. Sovereign claims to waters of the high seas restrict the range of war vessels and merchantmen. By reducing sovereign claims to the narrow three-mile belt, the range of these vessels is thereby expanded. The time honored position of the Navy is that the greater the freedom and range of its

warships and aircraft, the better protected are the security interests of the United States because greater utilization can be made of warships and military aircraft. In the event that there are certain sensitive points requiring larger areas of the sea to be under United States control for security purposes there are available the devices of Defensive Sea Areas and Maritime Control Areas which are well recognized in international law. These devices have been widely used by the United States in the past and are being used even at the present time." (Emphasis added.)

IV. BY THE PROVISIONS OF THE CIVIL AERONAUTICS ACT AND THE BOARD'S ACTION THEREUNDER THE UNITED STATES HAS ASSUMED EXCLUSIVE JURISDICTION OVER THE APPELLEES' OPERATIONS BETWEEN THE MAINLAND OF CALIFORNIA AND SANTA CATALINA ISLAND.

A. The Plain Meaning of the Statute, Its Legislative History and Obvious Purposes Bring This Transportation Under the Exclusive Control of the Civil Aeronautics Board.

As Appellees have shown, it is plain that the major portion of the waters between Santa Catalina Island and the mainland of California are outside the boundaries of California. Thus this transportation falls squarely within the definition of "interstate air transportation" in the Civil Aeronautics Act, subject to federal regulation, since such transportation is "between places in the same state of the United States through the air space over any place outside thereof". 49 U. S. C. 401 (21) (a). Efforts to evade the plain meaning of this language are necessarily examples of "what proposes to be mere rendering becom[ing] creation and attempted interpretation of legislation becom[ing] legislation itself." *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939.)

In *Lichten* v. *Eastern Air Lines,* 189 F. 2d 939, 941, (C. A. 2, 1951) the court commented on the obvious purpose of Congress in enacting the Civil Aeronautics Act:

> "A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. Civil Aeronautics Act §§ 404(a), 902(a), 49 USCA §§ 448(a), 622(a). To achieve this, it is essential, in the judgment of Congress that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services. *Adams Express Co.* v. *Croninge,* 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314; *Mack* v. *Eastern Air Lines, Inc., supra* [87 F. Supp. 113.]"

It is true that Congress has included this transportation within its definition of "interstate air transportation" although it is acting under its constitutional power to regulate "foreign commerce." *Lord* v. *Steamship Co.,* 102 U. S. 541 (1880); *Local 36 of International Fishermen, et al.* v. *United States,* 177 F. 2d 320 (C. A. 9, 1949); *Manaka* v. *Monterey Sardine Industries,* 41 F. Supp. 531 (D. C. N. D. Cal., 1941.) However, this fact has no legal significance since statutory definitions customarily control the meaning of statutory words. *Lawson* v. *Suwannee Fruit and S. S. Co.,* 336 U. S. 198, 201 (1949).

The legislative history of the Civil Aeronautics Act plainly shows that when Congress said "through the air space over any place outside thereof," it did not mean, "through the air space over any other state" as is contended by California. An early bill designed to regulate air transportation contained the phrase "between places in the same state through another state." S. 3027, 74th Cong., 1st Sess. 1935. In the course of the hearings on this bill Mr. Eastman, then Federal Coordinator of Transportation, suggested that it be replaced by the phrase which is now contained in the statute. As Appellants have

pointed out (Brief, pp. 63-64), when the suggestion was made it was explicitly recognized that the change would include transportation between points in the same state over a foreign country or the high seas as well as over another state. As Mr. Eastman stated, the same need existed for regulation in each case. Clearly, the "need" was for federal regulation. Appellants, not questioning Congress' constitutional power to regulate, argue that there was no need for federal regulation of transportation such as that here involved because in the absence of such regulation the states might act. The short answer is that Congress chose to act and the wisdom of such action is not open to question by the Public Utilities Commission of California.

It may also be noted that when Congress intends to deal only with transportation between places in the same state but through another state it knows how to say so. (Interstate Commerce Act, Part II, Motor Carriers, 49 U. S. C. 303(a)(10).) And, when Congress wishes to exempt interstate or foreign transportation having unique local characteristics from the operation of a law it again knows how to do so. (49 U. S. C. 303(b) (8).)

It is said by Appellants that a literal reading of the definition of "interstate air transportation" will lead to absurd results. (Brief, p. 61.) The example given (flying three miles out to sea to avoid state regulation of an otherwise intrastate route) fails to indicate the reason for the overseas segment of the flight. If it was a scheduled flight along a "civil airway" (49 U. S. C. 401 (16), 452), then it should be classified as "interstate air transportation" within the meaning of the Civil Aeronautics Act and would be subject to the jurisdiction of the Civil Aeronautics Board. This ill considered example adds nothing to the arguments of California. It is far removed from the present dispute which does not involve an attempt by

United to avoid regulation by an unusual flight pattern but rather the plight of a carrier that is subject to the conflicting claims of two regulatory bodies.

Apart from the plain language of the Act and the apparent Congressional purposes, a brief glance at the scope of the federal regulations will show that there is no room here for state action. *Public Utilities Comm. of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943.)

Tariffs for interstate air transportation must be filed with the Civil Aeronautics Board and observed by air carriers (49 U. S. C. 483), and the rates and charges contained therein may be fixed by the Board. (49 U. S. C. 642 (d).) Practices in connection with such transportation may be prescribed by the Board (49 U. S. C. 484, 491, 642), and operations may be instituted, suspended, or terminated only by leave of the Board. (49 U. S. C. 481 (a), (k).) Accounts and records must be maintained in accordance with standards prescribed by the Board. (49 U. S. C. 487.) Whether or not a particular carrier is rendering adequate interstate service, and what measure of service may be regarded as adequate, likewise are questions committed to the competence of the Board. (49 U. S. C. 484, 642.) Contracts between carriers affecting interstate air transportation, must be filed with the Board for its approval or disapproval. (49 U. S. C. 492.) Intercorporate relationships likewise are subjected to Board scrutiny and control. (49 U. S. C. 488, 499.)[12]

There can thus be no doubt that the Civil Aeronautics Act imposes complete and comprehensive regulation upon all phases of interstate air transportation. In clashes of State *vs.* Federal regulatory control of this nature, this Court has announced the following rule of law:

12. The very broad sweep of the Civil Aeronautics Act also serves to justify the scope of the judgment entered by the District Court. (See Appellants' Brief, p. 38.)

"The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, at 236 (1947.)

Appellants' contention that California may regulate this route must give way by virtue of the Supremacy Clause. U. S. Const., Art. VI, Cl. 2.

B. Appellants' Contention That Congress Did Not Intend to Regulate the Subject Transportation, Even If Not Intrastate, Is Insupportable.

Appellants argue that even if this transportation is something other than intrastate commerce, it is not the type of commerce covered by the Civil Aeronautics Act. (Brief p. 60.) In the first place this view is in direct conflict with the plain language of the statute. However, the cases and arguments of Appellants will be individually discussed.

The *Yellow Cab* cases cited by Appellants lend no support to their attempt to read confusion into the specific language of the Civil Aeronautics Act. In the first *Yellow Cab* case this Court held that the very general language of the Sherman Anti Trust Act could not have been intended to apply to "*local taxicabs* which merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent *local service*". Such service was "*not an integral part of interstate transportation.*" And, this Court said that "a restraint on or monopoly of that *general local service*" was not proscribed by the Sherman Act. *United States* v. *Yellow Cab Company*, 332 U. S. 218, 233 (1947). (Emphasis added.)

In the *Yellow Cab* case there was an attempt to bring a

federal statute to bear by inference upon an admittedly local activity. It can hardly be support for an attempt to upset by strained construction express federal regulation of an activity in foreign commerce.

It is said by Appellants (Brief p. 61) that there is a presumption here that the federal authority has not superseded that of the state because, if it did, the result would be a blow to the "delicate balance between Federal and State jurisdictions upon which our Federal government is based". It is, of course, recognized by Appellants that where the intent of Congress is clear the state authority will be superseded. That is this case.

Assuming that this case is one that involves "the delicate balance between our Federal and State jurisdictions", Appellants gather authorities behind their contentions that: (1) it must clearly appear that the Federal invasion of state authority is necessary; and, (2) nothing must be left to inference or presumption. The cases relied on all deal with situations where presumptions had to be indulged to bring *intrastate* activities under federal control. In *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 (1939), this Court said it has "disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress". This Court was acting with "proper regard" for the "rightful concern of local interests in the management of local transportation" in restricting application of federal power only to those cases where the statutory authority "affirmatively appears" in *Yonkers* v. *United States*, 320 U. S. 685, 691 (1944). *North Carolina* v. *United States* 325 U. S. 507, 510 (1945) presented the question of whether the indispensable prerequisites to the exercise of the federal power over intrastate rates had been shown to exist with sufficient certainty. And, in *Arkansas R. R. Commission* v. *Chicago*

Rock Island & Pac. R. R. Co., 274 U. S. 597, 603 (1927) this Court said that where "there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power". The case of *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 (1944) resolved the question of whether a California public warehouse fell within the exemptions afforded a "public utility" in the Emergency Price Control Act of 1944. "Public utility" had not been defined in the statute. This Court observed that a "traditionally local domain" was involved and found that Congress did not intend to supersede the power of a state regulatory commission exercising comprehensive control over the prices of a business appropriately classified as a utility. 321 U. S. at 154.

Examination of the above authorities relied on by Appellants reveals no basis for a conclusion that the courts will substitute their judgment for that of Congress as to the *necessity* for Federal regulation. It also demonstrates their irrelevance to this dispute. As Appellees have shown, this is not a case where an attempt is being made to expand by inference a general or doubtful federal statute or regulation in order to oust the state's power over an intrastate activity. Involved here is an attempt by a state to strike down Federal regulation of foreign commerce which has a clear statutory basis and which has been conducted continuously and without state protest for 12 years. "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power." *Simpson* v. *Shepard*, 230 U. S. 352 at 399 (1913).

Feeling no compulsion to cite authority, Appellants state: "Certainly the waters between the mainland of California and Santa Catalina are within the jurisdictional boundaries of the State of California". (Brief p. 63.) Because the

term "State" as used in Section 1(21)(a) of the Civil Aeronautics Act need not be limited to the *territorial* boundaries of a state but may reasonably include its *jurisdictional* boundaries, it is argued that the route in question is not "outside" the State of California.

Appellees find no basis in the context of the present dispute for any distinction between the territorial and jurisdictional boundaries of states. Even if there were such a distinction, the discussion *supra* is clearly indicative of the fact that the route in question passes through a place beyond the jurisdiction of California. Finally, again assuming that the suggested territorial-jurisdictional boundary dichotomy is valid, it is clear from the statutory definition of "United States" in the Civil Aeronautics Act[13] that the interpretation of the word "State" suggested by Appellants is unwarranted.

Appellees can only wonder why Appellants saw fit to discuss the numerous instances in which attempts to extend Federal economic regulation to wholly intrastate operations of air carriers have been unsuccessful. (Brief p. 65.) Such a discussion might be relevant if assertions were being made that this transportation, although completely intrastate, was nevertheless subject to the Civil Aeronautics Act. However, no such claim is being made. Appellees simply contend that this transportation is "interstate air transportation" as defined in the Civil Aeronautics Act.

13. "'United States' means the several States • • • including the Territorial waters and the overlying air space thereof." 49 U. S. C. 401 (32.)

CONCLUSION.

For the reasons stated the judgment of the District Court should be affirmed.

Respectfully submitted,

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